Information Law: Cases and Materials
Volume One

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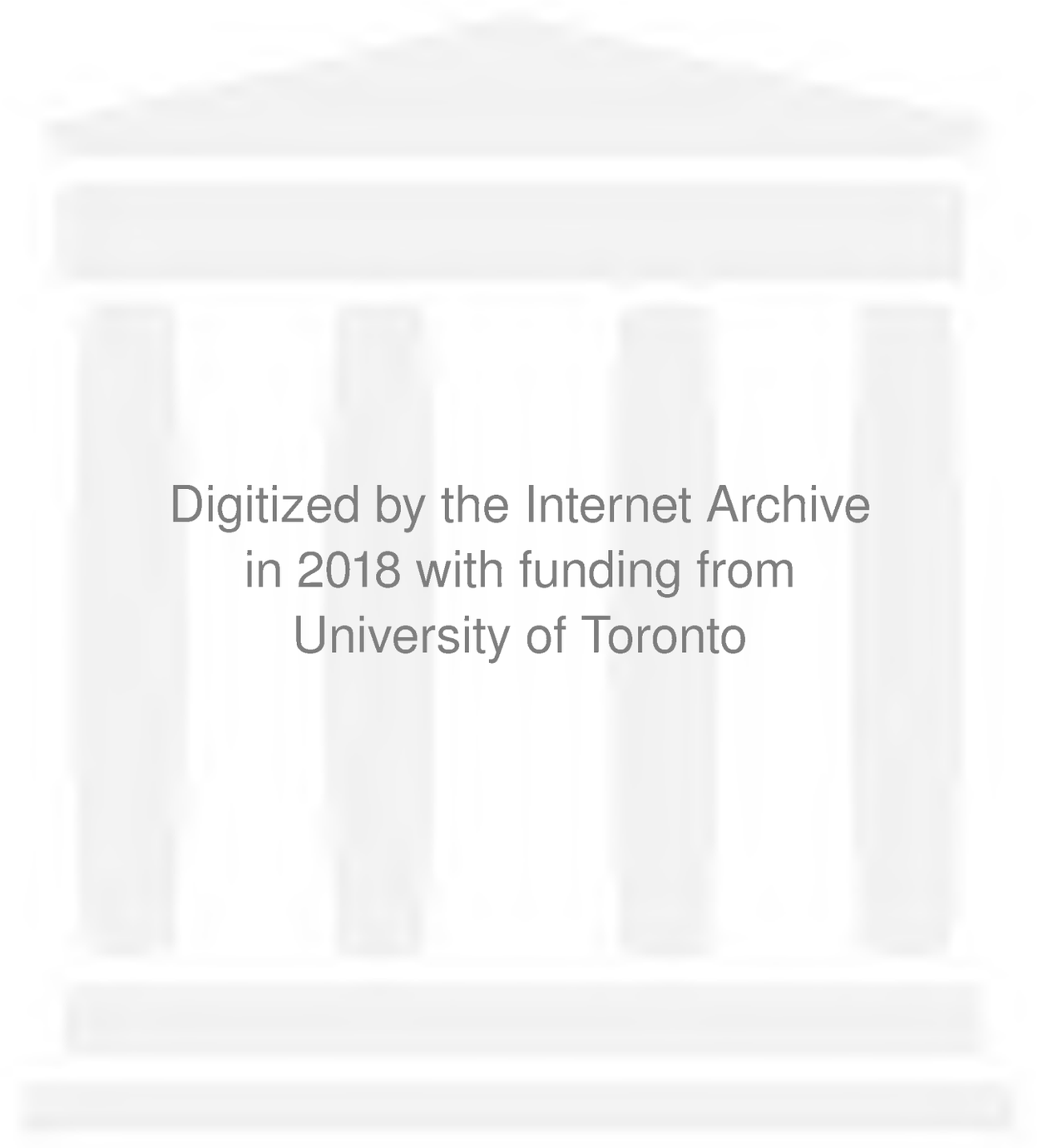

Notes

(a)*Keegstra*: Raising Doubts About the Marketplace of Ideas

In *R. v. Keegstra,* [1990] 3 S.C.R. 697, Dickson C.J., for the majority of the Supreme Court of Canada, upheld the constitutional validity of s.319(2) of the *Criminal Code*—a provision which prohibits the willful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. Dickson C.J. held that the provision infringed s. 2(b) but was justified under s.1 of the *Charter.* In reaching this conclusion, he argued the following:

> 60 As the quotations above indicate, the presence of hate propaganda in Canada is sufficiently substantial to warrant concern. Disquiet caused by the existence of such material is not simply the product of its offensiveness, however, but stems from the very real harm which it causes. Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment (Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded (p. 214).
>
> 61 In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, "Two Concepts of Liberty", in Four Essays on Liberty (1969), 118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.
>
> 62 A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe "almost anything" (p. 30) if information or ideas are communicated using the right technique and in the proper circumstances (at p. 8):
>
> > ... we are less confident in the 20th century that the critical faculties of individuals will be brought to bear on the speech and writing which is directed at them. In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said "let truth and falsehood grapple: who ever knew truth put to the

worse in a free and open encounter".

> We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society. Moreover, the alteration of views held by the recipients of hate propaganda may occur subtlely, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted (see Matsuda, op. cit., at pp. 2339-40).

63 The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.

...

82 In discussing the nature of the government objective, I have commented at length upon the way in which the suppression of hate propaganda furthers values basic to a free and democratic society. I have said little, however, regarding the extent to which these same values, including the freedom of expression, are furthered by permitting the exposition of such expressive aetivity. This lacuna is explicable when one realizes that the interpretation of s. 2(b) under Irwin Toy, supra gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the abstract. This approach to s. 2(b) often operates to leave unexamined the extent to which the expression at stake in a particular case promotes freedom of expression principles. In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).

...

87 At the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavors or in the process of determining the best course to take in our political affairs. Since truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute

certainty, it is difficult to prohibit expression without impeding the free exchange of potentially valuable information. Nevertheless, the argument from truth does not provide convincing support for the protection of hate propaganda. Taken to its extreme, this argument would require us to permit the communication of all expression, it being impossible to know with absolute certainty which factual statements are true, or which ideas obtain the greatest good. The problem with this extreme position, however, is that the greater the degree of certainty that a statement is erroneous or mendacious, the less its value in the quest for truth. Indeed, expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.

88 Another component central to the rationale underlying s. 2(b) concerns the vital role of free expression as a means of ensuring individuals the ability to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit. It is true that s. 319(2) inhibits this process among those individuals whose expression it limits, and hence arguably works against freedom of expression values. On the other hand, such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the s. 2(b) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.

89 Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

90 The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate -- indeed, perhaps even language intended to promote hatred -- is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless,

expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

91 Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers. In this regard, the reaction to various types of expression by a democratic government may be perceived as meaningful expression on behalf of the vast majority of citizens. I do not wish to be construed as saying that an infringement of s. 2(b) can be justified under s. 1 merely because it is the product of a democratic process; the Charter will not permit even the democratically elected legislature to restrict the rights and freedoms crucial to a free and democratic society. What I do wish to emphasize, however, is that one must be careful not to accept blindly that the suppression of expression must always and unremittingly detract from values central to freedom of expression (L. C. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America (1986), at pp. 87-93).

92 I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale. Together with my comments as to the tenuous link between communications covered by s. 319(2) and other values at the core of the free expression guarantee, this conclusion leads me to disagree with the opinion of McLachlin J. that the expression at stake in this appeal mandates the most solicitous degree of constitutional protection. In my view, hate propaganda should not be accorded the greatest of weight in the s. 1 analysis.

93 As a caveat, it must be emphasized that the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of s. 2(b) of the Charter. As noted already, suppressing the expression covered by s. 319(2) does to some extent weaken these principles. It can also be argued that it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive (see Braun, op. cit., at p. 490. In this regard, judicial pronouncements strongly advocating the importance of free expression values might be seen as helping to expose prejudiced statements as valueless even while striking down legislative restrictions that proscribe such expression. Additionally, condoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to s. 2(b) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.

> 94 None of these arguments is devoid of merit, and each must be taken into account in determining whether an infringement of s. 2(b) can be justified under s. 1. It need not be, however, that they apply equally or with the greatest of strength in every instance. As I have said already, I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" (Royal College, supra, at p. 247).

In dissent, Justice McLachlin, as she then was, stated the following regarding the "marketplace of ideas":

> 173 Another venerable rationale for freedom of expression (dating at least to Milton's Areopagitica in 1644) is that it is an essential precondition of the search for truth. Like the political process model, this model is instrumental in outlook. Freedom of expression is seen as a means of promoting a "marketplace of ideas", in which competing ideas vie for supremacy to the end of attaining the truth. The "marketplace of ideas" metaphor was coined by Justice Oliver Wendell Holmes, in his famous dissent in Abrams v. United States, 250 U.S. 616 (1919). This approach, however, has been criticized on the ground that there is no guarantee that the free expression of ideas will in fact lead to the truth. Indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.
>
> 174 Notwithstanding the cogency of this critique, it does not negate the essential validity of the notion of the value of the marketplace of ideas. While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, [page804] economic development and scientific and artistic creativity may stagnate in such societies.
>
> 175 Moreover, to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven either true or false. Many ideas and expressions which cannot be verified are valuable. Such considerations convince me that freedom of expression can be justified at least in part on the basis that it promotes the "marketplace of ideas" and hence a more relevant, vibrant and progressive society.

(b) Speech and the Economic Marketplace

In *Ford v. AG Quebec*, [1988] 2 SCR 712, the Supreme Court of Canada held that there was no "sound basis" for excluding commercial speech from the protection of of s.2(b). *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 included commercial

advertising within the scope of 2(b) protection. The rational for protecting commercial speech has primarily been to protect the interests of consumers and has even been invoked—controversially—to strike down a ban on tobacco advertising (*RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 311). In their overview of s.2(b), Kent Roach and David Schneiderman outline more developments:

> In *Guignard*,[1] the Court acknowledged that consumers also have the right to engage in counter-speech. The case concerned a Saint-Hyacinthe municipal by-law prohibiting advertising outside of designated industrial areas. Mr. Guignard erected a sign on one of his commercial properties, outside of a designated industrial area, complaining of the delay he was experiencing in receiving indemnification from his insurance company. Guignard's billboard proclaimed that: "When a claim is made one finds out about poor quality insurance."[2] Justice LeBel, for the majority, struck down the municipal by-law as consumers also have constitutional rights to freedom of expression and this occasionally will take the form of "counter-advertising." "Given the tremendous importance of economic activity in our society," wrote LeBel J., "a consumer=s 'counter-advertising' assists in circulating information and protecting the interests of society just as much as does advertising of certain forms of expression."[3] Not only was the consumer interest in receiving and responding to commercial speech highlighted in Justice LeBel's decision, so was the economic interest of producers. Justice LeBel acknowledged the great value that had been placed on commercial speech by the Court in earlier cases (as in *Rocket* and *RJR Macdonald*) and that:[4]
>
> > the need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on business and consumers having access to abundant and diverse information . . . The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising.
>
> This conclusion was embraced by the Ontario Court of Appeal in *Vann Niagara Ltd.* v. *Oakville*.[5] The case concerned a by-law of the municipality of Oakville which prohibited commercial billboard signs along highways and in certain designated areas. According to Justice Borins, for the majority, commercial expression is "a key component to our economic system and therefore merits Charter protection,"[6] and found the by-law constituted an unreasonable limitation on commercial speech rights. The Supreme Court of Canada reversed the finding under s.1, holding that Oakville could outlaw commercial billboard signs, but agreed with the Court below that the billboard restriction infringed s. 2(b).[7]
>
> If in previous decisions the relationship between consumers and producers has been obscured, the Court now appears ready to equate the constitutional rights of producers with those of consumers. The interests of the producers of goods to promote their wares in the marketplace equally now are paramount to those of consumers. In this

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[1] *R.* v. *Guignard* [2002] 1 SCR 472
[2] *Ibid.* at para. 3
[3] *Ibid.* at para. 23.
[4] *Ibid.* at paras. 21, 23.
[5] (2002) 60 OR (3d) 1 (Ont. C.A.).
[6] *Ibid.* at para. 17.
[7] *Corporation of the Town of Oakville* v. *Vann Niagara Ltd.*, SCC No. 29359 (13 November 2003).

> context, the Court is unwilling or unable to distinguish speech by the powerless and the powerful. Thus Guignard's billboard protest against the insurance companies translates into the right of powerful insurance companies and tobacco companies to advertise their products. Will there even be equanimity between the powerful and powerless in the application of commercial speech doctrine?[8]
>
> The political power of the powerless is made stark by recent enactments intended to do away with begging on the streets of Canadian municipalities. The Ontario Safe Streets Act,[9] for instance, prohibits certain forms of "aggressive soliciting," such as using abusive language or soliciting while intoxicated, and "solicitation" in certain locations, such as panhandling outside of banks or near bus stops. There seems little doubt that these provincial and municipal laws target expressive activities by reason of their content, in which case, they fall within the constitutionally-protected sphere of s. 2(b). Whether such a law could satisfy the s. 1 justification standard was addressed at trial in *R.* v. *Banks*.[10] Justice Babe characterized begging as "peripheral to the core values protected by s. 2(b)" as there is no evidence they are "intending to make a political point."[11] Yet, as Dick Moon has noted, though begging may not amount to a political critique of the socio-economic order, it is not "simply a request for money" but a "request for help."[12] That this appeal for assistance is not considered at least as constitutionally meritorious as cigarette advertising signals a disquieting bias in freedom of expression jurisprudence. To be sure, guaranteeing a constitutional right to beg is no means of satisfying the basic needs of poor people. The judicial orientation toward such claims, however, will reveal the extent to which middle-class consumer values predominate under the Charter.
>
> *Kent Roach and David Schneiderman, "Freedom of Expression in Canada" (forthcoming)*

(c)The Privacy of the Home and the Marketplace of Ideas

Although the United States First Amendmen jurisprudence seeks to protect a robust "marketplace of ideas," it also protects the privacy of the home. The United States Supreme Court has repeatedly held that the right to be left alone at home—sometimes discussed in terms of the right not to listen—outweighs any freedom of expression interest of an individual who would intrude upon that privacy. The following excerpt from *Federal Comunications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) at 748-750 shows how this understanding of the privacy of the home can have an impact on different forms of communication, an in particular radio broadcasting.

Mr. Justice Stevens (for the Court)—

> We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098. And of all forms of communication, it is broadcasting that

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[8] On judicial partiality in commercial expression cases, see David Schneiderman, "Constitutionalizing the Culture-Ideology of Consumerism" (1998) 7 Social and Legal Studies 213.

[9] S.O. 1999, c.8.

[10] (2001) 55 O.R. (3d) 374 (Ont. C.J.)

[11] *Ibid.* at 409.

[12] Richard Moon, "Keeping the Streets Safe From Expression" in Joe Hermer and Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 65 at 72.

has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371; 47 U.S.C. §§ 309(a), 312(a)(2); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S.Ct. 213, 216, 91 L.Ed. 204. Cf. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162; *Staub v. Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125. As we noted in *Cohen v. California:*

> "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' " 403 U.S., at 21, 91 S.Ct., at 1786.

The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. § 169 2d (1976 ed., Supp. II).

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*,

390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.*, at 640 and 639, 88 S.Ct., at 1280. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

(d) Anonymous Speech

The issue of anonymity and its connection to the values of freedom of speech was examined by the U.S. Supreme Court in *McIntyre v Ohio Elections Commission*, 115 S. Ct. 1511 (1995). A provision of the Ohio Code prohibited the distribution of anonymous election materials and Mrs. McIntyre was fined by the Ohio Elections Commission under the provision for handing out handbills that encouraged people to vote against a proposed school tax levy. The handbills did not include the required name or contact information. Mrs. McIntyre challenged the fine as an unconstitutional violation of the First Amendment guarantee of free speech. Holding the purpose of the provision to be the important identification of those who distribute materials containing false statements, the lower court upheld the infringement of the constitution because it was "reasonable" and "nondiscriminatory". The Supreme Court reversed this decision, holding that that the statue should be tested under a more severe standard because of the importance of the interest being affected. After examining the history of anonymous speech in the United States from pseudonymous authors to those who wrote in the Federalist Papers prior to the signing of the constitution, the court identified a "respected tradition of anonymity in the advocacy of political causes". The Ohio law was overly broad and did not just apply to libelous or false materials; rather it applied to all speech of a political nature. The fact that it identified speech by its content of 'core political speech' subjected it, in the opinion of the majority of the Supreme Court, to an exacting standard and the law did not withstand the constitutional violation. In short, the Supreme Court concluded that "Political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse".

(e) Regulating Speech on the Internet

There have been a number of cases in the United States that have been concerned with regulating speech on the internet and the constitutional questions that are raised by attempts to do so.

***Reno v. ACLU*, 117 S. Ct. 2329 (1997)**

[The Communications Decency Act of 1996 (CDA) included two provisions which were constitutionally challenged. The first prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. The second prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. There were two defences, one that covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors and one that covers those sho

restrict access to material by requiring designated forms of age proof, such as a verified credit card.]

STEVENS, J. (SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joining) --

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three- judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.

...

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core." These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." ...

...

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself ... and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images." Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available."

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." The Government offered no evidence that there was a reliable way to screen recipients and participants in such forums for age. Moreover, even if it were technologically feasible to block

minors' access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach."

. . . . .

"There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited."

In sum, the District Court found:

"Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers."

[Justice Stevens discussed the problems of vagueness and overbreadth in the CDA and concludes that the CDA would effective suppress speech that adults have a constitutional right to receive. He held that this is unacceptable if there are less restrictive alternatives available to achieve the purpose of protecting children. In determining the issue of less restrictice alternatives, he discussed some of the problems inherent in regulating speech on the internet.]

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See Ginsberg, 390 U.S., at 639, 88 S.Ct., at 1280; Pacifica, 438 U.S., at 749, 98 S.Ct., at 3040. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population ... to ... only what is fit for children." Denver, 518 U.S., at 759, 116 S.Ct., at 2393 (internal quotation marks omitted) (quoting Sable, 492 U.S., at 128, 109 S.Ct., at 2837-2838). "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of

discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74-75, 103 S.Ct. 2875, 2884-2885, 77 L.Ed.2d 469 (1983).

...

In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.

The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. 929 F.Supp., at 845 (findings 90-94). As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial--as well as some commercial--speakers who have Web sites to verify that their users are adults. Id., at 845-848 (findings 95-116). These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." Id., at 842 (finding 73) (emphases added).

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in Ginsberg and Pacifica, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpomographic material with serious educational or other value. Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message. ...

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year-old--no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year- old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U.S.C. § 223(a)(2) (1994 ed., Supp. II). Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material "indecent" or "patently offensive," if the college town's community thought otherwise. The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It

has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet--such as commercial Web sites--differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

...

In this Court, though not in the District Court, the Government asserts that-- in addition to its interest in protecting children--its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. Brief for Appellants 19. The Government apparently assumes that the unregulated availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Justice O'CONNOR (THE CHIEF JUSTICE joining) --

I write separately to explain why I view the Communications Decency Act of 1996(CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound.
...

...The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecency transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.
I

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. ... In Ginsberg v. New York, 390 U.S. 629, 634, 88 S.Ct. 1274, 1277-1278, 20 L.Ed.2d 195 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.

The Court in Ginsberg concluded that the New York law created a constitutionally adequate adult

zone simply because, on its face, it denied access only to minors. The Court did not question--and therefore necessarily assumed--that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L.J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, see id., at 901, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Id., at 888-889; id., at 887 (cyberspace "is moving ... from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves--perhaps an adult identification number or a credit card number--before they can access certain areas of cyberspace, 929 F.Supp. 824, 845 (E.D.Pa.1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. Id., at 839- 842. The Platform for Internet Content Selection project is designed to facilitate user-based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. Id., at 838-839.

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, id., at 845; Shea v. Reno, 930 F.Supp. 916, 933-934 (S.D.N.Y.1996), it is not available to all Web speakers, 929 F.Supp., at 845-846, and is just now becoming technologically feasible for chat rooms and USENET newsgroups, Brief for Appellants 37-38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned--and unzoneable. 929 F.Supp., at 846; Shea, supra, at 934. User-based zoning is also in its infancy. For it to be effective, (i) an agreed-upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available--and widely used--by Internet users. At present, none of these conditions is true. Screening software "is not in wide

use today" and "only a handful of browsers have screening capabilities." Shea, supra, at 945-946. There is, moreover, no agreed-upon "tag" for those programs to recognize. 929 F.Supp., at 848; Shea, supra, at 945.

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. Ante, at 2349. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, "reduce[s] the adult population [on the Internet] to reading only what is fit for children." Butler, 352 U.S., at 383, 77 S.Ct., at 526. As a result, the "display" provision cannot withstand scrutiny. Accord, Sable Communications, 492 U.S., at 126-131, 109 S.Ct., at 2836-2839; Bolger v. Youngs Drug Products Corp., 463 U.S., at 73-75, 103 S.Ct., at 2883-2885.

The "indecency transmission" and "specific person" provisions present a closer issue, for they are not unconstitutional in all of their applications. ...

So construed, both provisions are constitutional as applied to a conversation involving only an adult and one or more minors--e.g., when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in Ginsberg. Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults. The relevant universe contains only one adult, and the adult in that universe has the power to refrain from using indecent speech and consequently to keep all such speech within the room in an "adult" zone.

The analogy to Ginsberg breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the "indecency transmission" and "specific person" provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. Accord, ante, at 2347. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace restricts the rights of adults to engage in indecent speech in those rooms. The "indecency transmission" and "specific person" provisions share this defect.

But these two provisions do not infringe on adults' speech in all situations. ...
...I would therefore sustain the "indecency transmission" and "specific person" provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

Ashcroft v. American Civil Liberties Union

After the decision in Reno, Congress enacted the *Child Online Protection Act (COPA)*, which prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." Such harmful material is defined as

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Instead of applying to all communication over the internet, COPA's coverage is limited to material displayed on the WWW for commercial purposes. Further, it only prohibits "material that is harmful to minors." Under the Act, it is an affirmative defense that an individual "in good faith, has restricted access by minors to material that is harmful to minors--(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology."

Prior to COPA going into effect, its constitutionality was challenged by several parties whose Web sites contain "resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines." A preliminary injunction was granted, preventing the enforcement of COPA. This injunction was upheld by the United States Court of Appeals for the Third Circuit on the basis that the use of "contemporary community standards" to identify "material that is harmful to minors" rendered the statute overbroad. Because "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users" it would catch "any material that might be deemed harmful by the most puritan of communities in any state."

The United States Supreme Court granted certiorari on the question of the use of community standards. The Court held that uncertainty regarding "contemporary community standards" was not sufficient to render the statute overbroad for the purposes of the First Amendment. However, the court split on the question of whether local or national standards should apply. (*Ashocroft v. American Civil Liberties Union* 122 S. Ct. 1700 (2002).[*Note that Canada takes a very different approach to obscene speech. The Supreme Court of Canada held in *R. v. Butler*, [1992] 1 SCR 452, that the "community standards" test for obscene materials had to be read in light of the harms such materials could cause, not public morality.*]

On remand, the Third Circuit again affirmed the prelimary injunction granted by the District Court, concluding that COPA was not the least restrictive means available for the

Government to prevent minors from gaining access to harmful materials over the internt. The United States Supreme Court affirmed (*Aschcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004)). In delivering the opinion of the majority, Justice Kennedy stated (at 2791-3):

> In deciding whether to grant a preliminary injunction stage, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits. ...The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial.
>
> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.
>
> Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. *Id.*, at 484. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. See *id.*, at 484, 496-497. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.
>
> ...
>
> Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are. See 31 F.Supp.2d, at 492. Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA. The District Court made a specific factfinding that "[n]o evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive."

In dissent, Justice Breyer disagreed with Justice Kennedy's interpretation of COPA's provision. He also disagreed with Justice Kennedy's assessment of filtering technology (at 2802-3).

> Filtering software, as presently available, does not solve the "child protection" problem. It suffers from four serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornographic material to pass through without hindrance. Just last year, in American Library Assn., Justice STEVENS described "fundamental defects in the filtering software that is now available or that will be available in the foreseeable future." 539 U.S., at 221, 123 S.Ct. 2297 (dissenting opinion). He pointed to the problem of underblocking: "Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images." *Ibid.* That is to say, in the absence of words, the software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo. No Member of this Court disagreed.
>
> Second, filtering software costs money. Not every family has the $40 or so necessary to install it. See 31 F.Supp.2d, at 492, ¶ 65. By way of contrast, age screening costs less. See *supra*, at 2791 (citing costs of up to 20 cents per password or $20 per user for an identification number).
>
> Third, filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 842, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (BREYER, J., dissenting).
>
> Fourth, software blocking lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable. As Justice STEVENS pointed out, "the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as pornography or sex." *American Library Assn., supra*, at 222, 123 S.Ct. 2297 (internal quotation marks and citations omitted). Indeed, the American Civil Liberties Union (ACLU), one of the respondents here, told Congress that filtering software "block[s] out valuable and protected information, such as information about the Quaker religion, and web sites including those of the American Association of University Women, the AIDS Quilt, the Town Hall Political Site (run by the Family Resource Center, Christian Coalition and other conservative groups)." Hearing on Internet Indecency before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 2d Sess., 64 (1998). The software "is simply incapable of discerning between constitutionally protected and unprotected speech." *Id.*, at 65. It "inappropriately blocks valuable, protected speech, and does not effectively block the sites [it is] intended to block." *Id.*, at 66 (citing reports documenting overblocking).
>
> Nothing in the District Court record suggests the contrary. No respondent has offered to produce evidence at trial to the contrary. No party has suggested, for example, that

> technology allowing filters to interpret and discern among images has suddenly become, or is about to become, widely available. Indeed, the Court concedes that "[f]iltering software, of course, is not a perfect solution to the problem." *Ante,* at 2793.
>
> In sum, a "filtering software status quo" means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision. Thus, Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system. And a law that adds to that system an age-verification screen requirement significantly increases the system's efficacy. That is to say, at a modest additional cost to those adults who wish to obtain access to a screened program, that law will bring about better, more precise blocking, both inside and outside the home.

Further Questions

Kent Roach and David Schneiderman outline some further questions regarding regulating speech on the internet:

> Interesting questions also arise about the regulatory capacity of Canadian law to reach the operation of the Internet. To the extent that Internet access usually is transmitted and available via existing telephone technology, avenues for regulation will continue to exist. The Canadian Human Rights Act s. 13(1), for instance, prohibits the use of "telephonic communications" for the purposes of promoting hatred against identifiable groups. In *Citron* v. *Zundel*, a tribunal established under the Canadian Human Rights Act concluded that the prohibition applies to communications over the Internet.[13] The Holocaust-denial web site that was the target of the human rights law originated, however, in the state of California. Nevertheless, so long as the web site was under the control of Mr. Zundel and he was a "person in Canada," he was amenable to Canadian Human Rights Act jurisdiction.[14]
>
> Anonymous communications that require tracing to particular authors may prove to be more difficult. At this stage, the state of technology is less than perfect. One solution has been to make Internet Service Providers (ISPs) responsible for the material that they enable to be communicated over the Internet. Given the volume of traffic over the Internet, it seems practically impossible to monitor these communications in which they act as mere "intermediaries."[15] Rather than making ISPs responsible for all content, courts have preferred to make ISPs responsible for that content over which an ISP has editorial control. Generally speaking, as the Canadian Copyright Board ruled, the person who posts the material is responsible for it. The French Yahoo! case, suggests that an ISP will be expected to police its own content when it crosses national borders. Yahoo! Inc. was ordered by a French Court to block access from within France to an auction web site it hosted on Geocities.com that made available Nazi memorabilia. Despite pleas from Yahoo! that it could not police the content accessed by users from different countries,

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[13] *Citron* v. *Zundel* (No.4) , (2002) 41 CHRR D/274 (CHRT) at para. 86; http://www.chrt-tcdp.gc.ca/search/files/t460_1596de.pdf.
[14] Zundel v. Canada (1999) 67 CRR (2d) 59 (FCTD).
[15] Re SOCAN Statement of Royalties (Tariff 22, Internet) (2001) 1 CPR (4th) 417 (CCB).

these "obstacles," the Judge maintained, were not "insurmountable."[16] Yahoo! Inc. promptly removed its Nazi memorabilia section from Yahoo.com. Just as there is concern that an unregulated Internet will result in too much speech, there is the concern that a regulated Internet content will result in overbroad prohibitions.

...

A number of solutions to the problem of foreign-sourced offensive speech have been proposed, including the use of blocking technologies, imprecise filtering tools that weed out offensive communications, and rating systems. These remedies give rise to a different sort of overbeadth problem. Would government-mandated use of filtering technologies pose problems by catching too much speech, thereby not impairing rights as little as possible? As Justice Sopinka warned in a 1994 speech, we "must be very careful not to unduly restrict free speech simply because it is difficult to control the illegal use of information technologies."[17] The U.S. Supreme Court appeared to be far less concerned with the imprecision of filtering technologies in *United States* v. *American Library Association.*[18] The Children's Internet Protection Act required all libraries in receipt of federal funding that facilitated Internet access to use filtering software technology that blocks access to all persons of "visual depictions" that constitute obscenity of child pornography. The Act permitted the disabling of filters in the case of "bona fide research or other lawful purposes." The plurality held that the Act did not impose unconstitutional conditions on the receipt of federal funds - - libraries were not being asked to waive their constitutional rights. Instead, the condition was consistent both with the Congressional legislative objective and the libraries' traditional function of obtaining materials for educational and informational purposes. Nor did the law offend the First Amendment rights of adult users - - the filters could easily be disabled at the adult user's request.

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[16] *UEJF and LICRA* v. *Yahoo! Inc. and Yahoo! France* at http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (22 May 2000); http://www.cdt.org/speech/international/001120yahoofrance.pdf (20 November 2000).

[17] The Hon. John Sopinka, "Freedom of Speech and Privacy in the Information Age" Symposium on Free Speech and Privacy in the Information Age, University of Waterloo (26 November 1994) at gopher://insight.mcmaster.ca:70/oo/org/efc/doc/sfsp/sopinka.

[18] 539 US __ (2003).

Notes

(a) *Vancouver Sun (Re)*, 2004 SCC 43

The Supreme Court of Canada recently considered the open courts principle in relation to the level of secrecy attending judicial investigative hearings provided for in s. 83.28 of the *Criminal Code* (as Amended by the *Anti-terrorism Act*, S.C. 2001, c.41). The majority concluded, at para. 4, that the open court principle "should not be presumptively displaced in favour of an *in camera* process." In outlining the parameters of the open court principle, Iacobucci and Arbour JJ. stated the following:

> 28 This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais, supra*; *Mentuck, supra*; *R. v. Oakes*, [1986] 1 S.C.R. 103. The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial: *Mentuck, supra*, at paras. 33, and may include privacy and security interests.
>
> 29 From *Dagenais, supra*, and *Mentuck, supra*, this Court has stated that a publication ban should be ordered only when:
>
> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> (*Mentuck, supra*, at paras. 32)
>
> 30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck, supra*, at paras. 36.
>
> 31 While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais, supra*; *Mentuck, supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at paras. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41). The burden of displacing the general rule of openness lies

> on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at paras. 71.

Note that *Vancouver Sun (Re)* was a companion to *Application under s.83.28 of the Criminal Code (Re)*, 2004 SCC 42, which reviewed all of the issues on the constitutionality and application of s.83.28 of the *Criminal Code*.

(b) Electronic Access to Court Records

The Judges Technology Advisory Council of the Canadian Judicial Council recently released a discussion paper on the topic of electronic access to court records: Open Courts, Electronic Access to Court Records, and Privacy (http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf). The JTAC concluded that Canadian jurisprudence establishes that "the right of the public to open courts is an important constitutional rule, that the right of an individual to privacy is a fundamental value, and that the right to open courts generally outweighs the right to privacy." However, it argued that many policy and logistical issues must be resolved to accommodate the electronic filing and retrieval of court records and docket information. One of these issues is the difference between a paper-based environment and an electronic one. The JTAC argued:

> There are at least two options. The first is to establish the same policies and presumptions of openness in the paper and the electronic environments. Proponents argue that there is no justification for restricting access to court records and docket information in the electronic medium. Indeed, those who support this position assert that by gaining access to court records and docket information, not only will practical obscurity disappear but meaningful access will finally be provided. Technical capacity will create equality of access. Furthermore, if the standard is different between paper and electronic access, and if, realistically it will take years for all court records and docket information to be converted to electronic form and in the meantime, courts are likely to operate with historic files in paper form and current files in electronic form, the prospects for inconsistent treatment are pronounced. Staff will have to be trained on two systems of access. The greater the disparity, the more likely there will be errors. Training costs and error rates can be reduced if there is a consistent approach.
>
> The second option is to maintain different policies depending on the medium in which the court records and docket information is available. Proponents argue that access to compiled computerized information is fundamentally different than what is available in the paper world, that simply because it is capable of being provided does not mean it ought to be provided, that ready accessibility (particularly to commercial users) will be inconsistent with the purposes for which the court records were provided, that practical obscurity ought not to be altered, and that enhanced accessibility may discourage litigants from recourse to the courts because of the risk of identity theft and the increased prospects of publicity.
>
> Those who advocate consistency in access yet recognize that the demise of practical obscurity may create opportunities which ought to be discouraged, have argued that the negative aspects of consistency of access in the paper and the electronic environments can be compensated in various ways to which reference will be made below (no bulk searches, tracking identity of searcher, access on site only).

Notes

(a) *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084

Shortly after the *Committee for the Commonwealth of Canada* was decided, the Supreme Court heard an appeal concerned with the constitutional validity of a municipal by-law prohibiting all postering on public property. A unanimous court held that the prohibition violated s. 2(b) of the *Charter* and was not justified under s. 1 because it did not restrict expression as little as is reasonably possible.

The Court held that all three of the approaches outlined in *Committee for the Commonwealth of Canada* would support the finding that postering on some public property is protected by s. 2(b).

Note that more recently, in R. v. Guignard, [2002] 1 S.C.R. 472, the court reiterated the value of "inexpensive means of communications" such as postering.

(b) *Native Women's Association*, [1994] 3 S.C.R. 627

During the constitutional reform discussions that led to the Charlottetown Accord, the federal government provided $10 million to fund participation of four national Aboriginal organizations. The Native Women's Association of Canada (NWAC) argued that choosing to fund male-dominated groups while excluding them from direct funding and from direct participation in the discussions violated their freedom of expression and right to equality. The Supreme Court of Canada rejected NWAC's claims and held that the government was entitled to consult with some groups and not others.

In writing for the majority, Sopinka J. stated, at para. 52, that *Haig*

> establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in Haig leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory fashion contrary to the Charter.

In separate reasons, L'Heureux-Dubé J. agreed with Sopnika J.'s reasons and results, except for his characterization of Haig. She argued, at para. 86, that Haig "stands for the proposition that the government in that particular case was under no constitutional obligation to provide for the right to a referendum under s. 2(b) of the Charter, but that if and when the government does decide to provide a specific platform of expression, it must do so in a manner consistent with the Charter."

(c) *Adbusters Media Foundation v. Attorney General of Canada*

Adbusters has recently initiated legal action against four of Canada's biggest television broadcasters, as well as the Attorney General of Canada. Their complaint centres

around the broadcaster's rejection of Adbuster's attempt to buy airtime for the "social marketing" spots—15-30 second TV messages that tackle issues from obesity to environmental destruction to consumer consumption.

For more information, and to view the TV messages, see http://adbusters.org/metas/psycho/mediacarta/index.html.

Court File No. 04-CV-275352CM3
SUPERIOR COURT OF JUSTICE
(Toronto Region)

BETWEEN:

Adbusters Media Foundation
Applicant
- and -

Attorney General of Canada
Canadian Broadcasting Corporation
CanWest Global Communications Corporation
Bell Globemedia Incorporated
CHUM Limited
Respondents

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE THAT the applicant intends to claim a remedy under section 24(1) of the Charter of Rights and Freedoms in relation to acts and omissions of the Government of Canada.
THE QUESTION is to be argued, on a date to be set by the court, at the courthouse located at 361 University Avenue, Toronto, Ontario.
THE FOLLOWING ARE THE MATERIAL FACTS giving rise to the constitutional question:
(a) the applicant is a not-for-profit advocacy organization whose aim is to advance media democracy and social marketing;
(b) in the autumn of 2003, the applicant attempted to advertise during television broadcasts by CBC, Global Television, CTV Television, CHUM Television, and two other Canadian television broadcasters;
(c) three of the television broadcasters rejected all of the proposed advertisements; two of the broadcasters rejected almost all of the proposed advertisements; and one of the broadcasters accepted six of ten proposed advertisements, but with severe restrictions in regard to the programming during which the six advertisements could be aired;
(d) requests by the applicant in 2004 that the broadcasters review their rejections of the advertisements resulted in negative responses or no responses; and
(e) the content of the advertisements was the reason for the rejection of the advertisements or, where they were accepted with restrictions, for the restrictions imposed.

THE FOLLOWING IS THE LEGAL BASIS for the constitutional question:

(a) the applicant's freedom of expression, as protected by section 2(b) of the Charter of Rights and Freedoms, has been infringed;
(b) the respondent broadcasters, as agents controlling the public airwaves as licensees of the federal

government, have infringed Adbusters' section 2(b) Charter rights;
(c) the respondent Attorney-General of Canada has failed in its duty to ensure that Adbusters' section 2(b) Charter rights are not infringed; and
(d) the breach of the applicant's freedom of expression cannot be demonstratively justified as a reasonable limit pursuant to section 1 of the Charter.

DATE AT TORONTO this 13th day of September 2004

Court File No.

SUPERIOR COURT OF JUSTICE

(Toronto Region)

BETWEEN:

Adbusters Media Foundation

Applicant

- and -

Attorney General of Canada

Canadian Broadcasting Corporation

CanWest Global Communications Corporation

Bell Globemedia Incorporated

CHUM Limited

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing, on a date to be set by the court, at the courthouse

located at 361 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____ Issued by _____

Local Registrar

Superior Court of Justice

361 University Avenue

Toronto, Ontario

TO:

Canadian Broadcasting Corporation

Legal Department

6th Floor

250 Front Street West

Toronto, Ontario M5W 1E6

CanWest Global Communications Corporation

Legal Department

2nd Floor

1450 Don Mills Road

Toronto, Ontario M3B 2X7

Bell Globemedia Inc.

Legal Department

9ChannelNine Court

Toronto, Ontario M1S 4B5

CHUM Limited

Legal Department

299 Queen Street West

Toronto, Ontario M5V 2Z5

Attorney General of Canada

Suite 3400, The Exchange Tower

Box 36, First Canadian Place

Toronto, Ontario M5X 1K6

APPLICATION

The applicant makes application for:

(a) a declaration that the respondent broadcasters have infringed Adbusters' rights as guaranteed by section 2(b) of the Charter of Rights and Freedoms;

(b) a declaration that the respondent Attorney-General of Canada has failed in its duty to ensure that the respondent broadcasters not infringe Adbusters' rights as guaranteed by section 2(b) Charter;

(c) a declaration that the respondent Attorney-General of Canada has infringed Adbusters' rights as guaranteed by section 2(b) of the Charter;

(d) a remedy pursuant to section 24(1) of the Charter requiring that the respondent broadcasters air Adbusters' advertisements in the same manner as it does other paid advertisements;

(e) a remedy pursuant to section 24(1) of the Charter requiring that the respondent Attorney General ensure that the respondent broadcasters air Adbusters' advertisements in the same manner as it does other paid advertisements; and

(f) such further and other remedy that counsel may submit and that this Honourable Court may hold is

appropriate.

The grounds for the application are that:

(a) the applicant is a not-for-profit advocacy organization whose aim is to advance media democracy and social marketing;

(b) in the autumn of 2003, the applicant attempted to advertise during television broadcasts by CBC, Global Television, CTV Television, CHUM Television, and two other Canadian television broadcasters;

(c) three of the television broadcasters rejected all of the proposed advertisements; two of the broadcasters rejected almost all of the proposed advertisements; and one of the broadcasters accepted six of ten proposed advertisements, but with severe restrictions in regard to the programming during which the six advertisements could be aired;

(d) requests by the applicant in 2004 that the broadcasters review their rejections of the advertisements resulted in negative responses or no responses;

(e) the content of the advertisements was the reason for the rejection of the advertisements or, where they were accepted with restrictions, for the restrictions imposed;

(f) the applicant's freedom of expression, as protected by section 2(b) of the Charter of Rights and Freedoms, has been infringed;

(g) the respondent broadcasters, as agents controlling the public airwaves as licensees of the federal government, have infringed Adbusters' section 2(b) Charter rights;

(h) the respondent Attorney-General of Canada has failed in its duty to ensure that Adbusters' section 2(b) Charter rights are not infringed;

(i) the breach of the applicant's freedom of expression cannot be demonstratively justified as a reasonable limit pursuant to section 1 of the Charter.

The following documentary evidence will be used at the hearing of the application:

(a) the affidavit of Tim Walker (attached);
(b) the affidavit of Kalle Lasn (attached);
(c) the affidavit of Stephen Kline (attached); and,
(d) such further and other evidence as counsel may advise and this Honourable Court admit.

Notes

(a) Search and Seizure and the Press: Recent Developments

Andrew McIntosh, an investigative journalit working on a project concerning then-Prime Minister Chretien's business dealings in his riding of St. Maurice, received an anonymous brown paper envelope containing a document that, if true, was evidence that the Prime Minister was in a conflict of interest. The RCMP obtained search warrants to compel production of the envelope and its contents so that they could, through forensic examination, seek to identify who sent the documents as well as establish that it was a forgery. The National Post's application to have the search warrants quashed was allowed: ***R. v. National Post* (2004), 69 O.R. (3d) 427**.

In quashing the warrantes, Benotto S.J., at paras. 53-4, held that

> In my view, the issuing justice did not have adequate information pertinent to the Charter issue. The warrants violate the Charter. In this case, the eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown's investigation. Mr. McIntosh is a well-respected journalist working for a major national newspaper on an important story. Society's interest here, in protecting the confidentiality he promised, outweighs the benefits of disclosing the document.
>
> The issuing justice was not alive to these complex issues and thus not able to perform the balancing required. By proceeding on an ex parte basis, he precluded a complete analysis of the confidentiality issue. I find that he failed to give adequate consideration to the pertinent factor of confidential sources. This would have affected his decision to issue the warrant and results in a finding that the warrant was invalid and should not have been issued.

Benotto S.J. also held that the documents received by the National Post are protected by the common law of privilege. He stated, at paras. 78-82:

> The Wigmore criteria, applied to this case, demonstrate an overwhelming interest in protecting the identity of Mr. McIntosh's source. But more is required. It must also be demonstrated that the benefit that inures from privilege outweighs the interest in the correct disposal of the litigation. ...
>
> The balancing of these competing interests leads me to confirm the privilege. Here, the document is required as part of an investigation, not the defence of an accused. There is evidence that the document was probably extensively handled. There is only a remote and speculative possibility that the fingerprints were those of the alleged forgerer. Disclosure of the document will minimally, if at all, advance the investigation while at the same time damage freedom of expression.
>
> There are unique factors here, including the confidential relationship between X and Mr. McIntosh: the fact that he was promised confidentiality; the politically charged nature of the information obtained; the importance of informing Canadians with respect to the most powerful political figure in the country; and the vast body of evidence and jurisprudence produced which show the

> importance of confidentiality in the news gathering role of the press. All these factors outweigh the benefits of disclosure in the context of this investigation.
>
> Insofar as the documents may reveal the confidential identity of a source, they are privileged.
>
> I have been urged to develop guidelines for the production of journalistic information. This would be contrary to the approach which I believe is mandated by the law: a case-by-case balancing of respective interests.

On January 20, 2004, the RCMP obtained warrants to search an office of the Ottawa Citizen and the home of Juliet O'Neill, a journalist with the Ottawa Citizen. The warrants were issued in connection with an RCMP investigation into a violation of s.4 of the *Security of Information Act*, R.S.C. 1985, c.O-5. The allegations against Ms. O'Neill were that she was in receipt of information pertaining to Mr. Mahar Arar that was designated as "classified secret." The Justice of the Peace who issued the warrants also issued sealing orders for 12 pages of the application materials.On January 21, 2004, the search warrants were executed.

Ms. O'Neill has challenged the constitutionality of s.4 of the *Security of Informaiton Act* on the grounds that it violates s. 2(b) of the Charter by interfering with the freedom of the press to gather and disseminate information of public interest, as well as violates s.7 of the Charter for a variety of reasons including vagueness and overbreadth. Ms. O'Neill has also challenged the validity of the search warrants because they failed to include any safeguards for freedom of the press. O'Neill also had to challenge the sealing orders in order to have access to the informations relied on to obtain the warrants.

The sealing orders were recently quashed: **Canada (Attorney General) v. O'Neill, [2004] O.J. No. 4649 (Ont. Sup. Ct.)**. Ratushny J. held, at paras. 46 and 47:

> The Sealing Orders were too broad and the respondent concedes this defect. By sealing information indiscriminately, the Sealing Orders failed to minimally impair the open court principle. They failed to comply with s. 487.3 of the *Code*. They failed to satisfy the *Dagenais/Mentuck* test requiring a showing of necessity and a balancing of their salutary and deleterious effects.
>
> These failings are significant. There is more at stake than simply two defective orders. Fundamental to Canada's rule of law and to the operation of our democracy is the principle that all of our judicial proceedings should be open to public scrutiny and public criticism. Every time the public is excluded from some part of Canada's court process, there exists the potential that the operation of Canada's rule of law and its democracy is being secretly undermined. National security confidentiality claims are to be considered seriously. They are naturally intimidating. However, there is no presumption in favour of secrecy, even in the face of national security confidentiality issues arising during judicial proceedings. That is the very reason for the *Dagenais/Mentuck* test. It is a flexible test directed towards maintaining the integrity of Canada's justice system but allowing, in exceptional circumstances and only where all other reasonable alternatives have

> been explored, for the non-disclosure of certain information that is before the courts.

However, after reviewing the evidence and applying the Dagenais/Mentuck test, Ratushny J. held that some of the information that was the subject of the sealing order should remain sealed.

(b) "Considerable Sympathy": Privacy and Section 7 of the *Charter*

The Supreme Court has examined the place and protection of the right to privacy under Section 7 of the *Charter* in a number of cases. The jurisprudence recognizes that privacy is protected under both the right to liberty and the right security of the person. While the discussion has remained tangential, the court's "considerable sympathy" for its inclusion under s. 7 points to the importance that Canada's highest court has given to privacy under the *Charter*.

In 1988, in *R v Beare*[19], the Supreme Court "expressed sympathy" for the notion that the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" protects a right to privacy. In *Beare*, the accused challenged the police procedure of finger-printing arrested suspects in custody for the committal of a crime as a violation of s. 7. LaForest J., writing for the majority, sympathized with the notion that privacy was protected by s. 7, but pointed to the ruling in *Hunter v Southam*[20], holding that the constitution protects a "*reasonable* expectation" (italics added) of privacy. The majority in *Beare* held that an individual arrested for a serious crime must lose some expectations of personal privacy, including the right to be free of certain physical observations and documentation, such as fingerprinting. While the challenge was unsuccessful, the inclusion of a reasonable expectation of privacy under s. 7 received sympathetic treatment by the court.

Following *Beare* the intersection between privacy and s. 7 arose in *Rodriguez v. British Columbia (Attorney General)*[21]. Both the majority judgment, written by Sopinka J., and L'Hereux-Dube's dissent found that the challenged provision of the *Criminal Code* [s. 241(b)] prohibiting assisted suicide violated s. 7 of the Charter. The violation lay in the provision's infringement of the right to security of the person. Sopinka J. writes, "There is no question, then, that personal autonomy, at least with respect to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person..." (para. 136). Agreeing on this point, L'Hereux-Dube J. elaborates that security of the person "has an element of personal autonomy, protecting the dignity and privacy of individuals" (para. 200). While the majority and the dissent agree that security of the person incorporates personal autonomy over decisions concerning the privacy and dignity of one's own body, the majority finds that this violation is in accordance with the principles of fundamental justice because the infringement is necessary to prevent homicides masked as assisted suicides. L'Hereux-Dube J. disagrees and argues that the violation is arbitrary and therefore is *not* in accordance with the principles of fundamental justice; however, the point of agreement on the inclusion of the right to

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[19] [1988] 2 SCR 87 [hereinafter *Beare*]
[20] [1984] 2 SCR 145
[21] [1993] 3 SCR 519 [hereinafter *Rodriguez*]

make automous and private decisions about the dignity of one's body under security of the person represents an important advancement for *Charter* protection of privacy.

In *R v. O'Connor* [1995] 4 SCR 411, the court addressed the privacy interest that is engaged in the production of medical records in a criminal trial and extended the relationship between privacy and s. 7 to encompass the right to liberty. As with *Rodriguez*, the majority and minority opinions agreed on the inclusion of the right to privacy under s. 7, but disagreed on how this right should be balanced against other societal interests. *O'Connor*, a sexual assault case, concerns the defense's request for the production of reports associated with the complainant's medical and counseling records. LaForest J., writing for the majority, "agree[s] with L'Hereux-Dube J., that a constitutional right to privacy extends to information contained in many third party records". In her dissent, L'Hereux-Dube J. argues that protection for privacy is guaranteed under the right to liberty in s. 7. She writes, "Respect for individual privacy is an essential component of what it means to be 'free'. As a corollary, the infringement of this right undeniably impinges upon an individual's liberty in our free and democratic society". She goes on to argue that "the nature of the private records which are the subject matter of this appeal properly brings them within that rubric" (para. 118). Of course, any rights are absolute and L'Hereux-Dube recognizes that an individual's right to privacy in personal medical records must be balanced against the potential violation of an accused's right to make full answer and defense at trial. While the majority agrees with L'Hereux-Dube J.'s treatment of s. 7 and the right to privacy, it holds that the accused's right to a fair trail is equally valuable and upholds the B.C. Court of Appeal order to produce certain documents. Disagreeing with the majority holding, L'Hereux-Dube J. argues that the individual's right to privacy must be paramount in the determination of how and when private medical records should be produced.

Soon after the *O'Connor* decision, the issue of privacy arose in another s. 7 challenge in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*[22]. The case centered on whether or not the rights of parents of a young child had been violated when the child was made a ward of the state in order to provide a life-saving blood transfusion, which was against the religious beliefs of the parents. The court found that the parents' liberty interest in the right to make important decisions regarding their children was engaged when the state intervened to procure the necessary medical treatment. This liberty interest, writes LaForest J. for the majority, lies in the importance our society attaches to freedom of choice and personal autonomy. Agreeing with Wilson J.'s assertion in *R v. Morgentaler*[23] that the liberty interest of s. 7 encompasses protection for "the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions" (para. 80, quoting Wilson J.), LaForest J. follows L'Hereux-Dube in *O'Connor* to extend the scope of the liberty interest protected by s. 7 to include personal autonomy and freedom over private and personal decisions. The ruling goes on to argue that while the state's actions *did* violate the parents' rights to liberty under s. 7, the violation was in accordance with the principles of fundamental justice. In balancing the right to liberty against the state's interest in protecting the child's life and health, the court asserts that the latter should take precedence.

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[22] [1995] 1 SCR 315

[23] [1988] 1SCR 30 [hereinafter *Morgentaler*]

In *M. (A.) v. Ryan*[24], the court was again faced with the issue of the compelled production of personal records held by third parties. While *Ryan* was a civil, rather than a criminal case, the majority upheld the Court of Appeal's ruling to produce certain documents in the interest of the defendant's right to full disclosure within the civil justice system . Writing the dissenting opinion, L'Hereux-Dube J. disagrees. She asserts that the records in question are similar to those at issue in *O'Connor* and thus engage a right to privacy. In her opinion an individual's rights to privacy, which she asserts is "essential to human dignity" (para. 80), should not be superceded by the respondent's right to a fair trial. While recognizing the importance of balancing conflicting interests, the right to privacy in personal records, guaranteed under the s. 7 right to liberty and security of the person requires a more stringent screening process prior to production in order to safeguard the complainant's privacy interest to the highest possible degree.

In the final case where issues concerning privacy were challenged under s. 7, the court was faced with a state-imposed restriction on choice, which infringed an individual's privacy. In *Godbout v. Longueiul (City)*[25], the plaintiff commenced an action for wrongful dismissal. As a former employee of the city, her position was terminated due to a conflict between the municipality's employment requirement of residence within the city-limits and her choice to reside outside the city. The plaintiff argued that the city's actions violated s. 7 of the *Charter*. Drawing on Wilson J's characterization of the liberty right in *Morgentaler* and on the sympathetic treatment for the inclusion of privacy under s. 7 in his judgment in *Beare*, LaForest J., writing for the majority, expressed his view "that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference" (para. 66). Accordingly, the municipality's regulations regarding residence within city limits imposes restrictions on an individual's freedom to make choices on where to live, which is a matter of personal privacy. The challenge was successful and the plaintiff was re-instated and awarded damages.

The court has included protection for privacy under s. 7 in its treatment of the right to liberty and security of the person. While a direct challenge of a privacy related concern under s. 7 remains to come before the court, given the rising importance of privacy in today's electronic and information age, the Supreme Court will likely be refining its treatment of the relationship in the near future.

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[24] [1997] 1 SCR 157 [hereinafter *Ryan*]
[25] [1997] 3 SCR 315

Notes

(a) Video Surveillance by the R.C.M.P. in Kelowna, British Columbia

In early 2001, after consulting with local officials and businesses, the Kelowna detachment of the R.C.M.P. installed video surveillance cameras at an intersection in the city. In addition, signs indicating that surveillance videos were in operation were posted around the intersection. The videotaping ran continuously and was monitored by assistants hired by the R.C.M.P.. The tapes were changed daily and according to policy were stored for six months before being destroyed, unless they were required for an administrative or purpose, in which case they were kept for a longer period of time. Following a complaint to the Privacy Commissioner's office, federal Privacy Commissioner, George Radwanski, investigated and ruled that the continuous video taping of a public place violated privacy rights guaranteed under the *Privacy Act*. His report granted that that security cameras have a place in law enforcement, but Radwanski objected to the continual taping of a public area that is not otherwise sensitive area for security and safety reasons. While conceding that the right to privacy is less in public places than in private homes, he asserts that "...in those public places, we retain the privacy right of being "lost in the crowd," of going about our business without being *systematically* observed or monitored, particularly by the state"[26].

Following the release of the Privacy Commissioner's report, the R.C.M.P. did not remove the surveillance cameras from the intersection, but did stop the continuous recording, thus technically complying with the *Privacy Act*; however, this did not satisfy the Commissioner. He proceeded to launch a challenge under the *Charter of Rights and Freedoms*. The case went before the Supreme Court of British Columbia in March of 2003 and in June of the same year, the court agreed with the Attorney General's submission that the Mr. Radwanski did not have standing to bring the *Charter* challenge before the court in his capacity as Privacy Commissioner. Following Mr. Radwanski's resignation as Commissioner, his newly appointed predecessor, Robert Marleau, announced that the suit and any future appeals were being withdrawn.

The R.C.M.P.'s use of video surveillance in Kelowna is far from an unusual practice. Video surveillance of public places in the interests of security and law enforcement is becoming increasingly common. For example, the use of closed circuit television (CCTV) by law enforcement agents in Washington, D.C. has increased significantly as a response to increases security pressures since September 11th. Organizations and advocacy groups, such as EPIC (Electronic Privacy Information Center) have responded to this increased use of the technology by highlighting concerns that video surveillance presents vis-à-vis privacy rights. Examples include the likelihood and incidence of abuse of video surveillance (predominantly the voyeuristic observation of women by monitors) the chilling effect of monitoring on public events and expression, such as political rallies and concerns over how the video images might be used in combination with other technologies, such as biometrics. Groups such as EPIC, also question the efficacy of video surveillance in preventing crime. To date, video surveillance has not

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[26] Radwanski, George. "Privacy Commissioner's finding on video surveillance by RCMP in Kelowna". Federal Privacy Commissioner's website: http://www.privcom.gc.ca/cf-dc/02_05_b_011004_e.asp

proved successful in the "fight against terrorism" and a study by the Home Office in Britain, where video surveillance technology is more common, found that the "best current evidence suggests that CCTV reduces crime to a small degree. CCTV is most effective in reducing vehicle crime in car parks, but it had little or no effect on public transport or city center settings"[27] While video surveillance can play a role in increasing public safety and security, privacy advocates suggest that its unquestioned proliferation in pubic spaces raises alarming issues around privacy and civil liberties that should be addressed rather than ignored.

(b) Biometrics

When the 2001 Super Bowl was held in a Florida stadium, the football fans and spectators were unknowingly subjected to a post-modern, multi-layered example of the 'observation of the observers'. The crowd was being monitored by biometric, face-recognition software in an attempt by law-enforcement agents to identify known criminals. The response to the use of this technology, provided free to the organizers by the manufacturer, produced strong reactions in civil libertarians and privacy advocates. The American Civil Liberties Union (ACLU) responded by condemning the practice and calling for public hearings into its use. ACLU and other groups expressed concern over the clandestine nature of the surveillance, as well as the potential for error in its application.

Biometrics refer to the "automatic identification or identity verification of living persons using their enduring physical or behavioral characteristics, including finger prints, signatures, retinas, voices and odors"[28] Facial recognition is one type of biometrics, which measures the differences in facial feature construction and compares these measurements against a database of identified faces. For example, at the 2001 Super Bowl, video cameras filmed the crowd and facial images were digitalized into pictures that were then compared against databases of known criminals. While this technology has been lauded for what it offers to security and policing efforts, its use also raises concerns for privacy rights. For example, its interface with databases is one of the major problems identified by privacy advocates. Biometrics requires databases of comparable and identified individuals in order to be effective and this interface increases the likelihood of privacy violations. The use of databases raises privacy issues associated with the security, reliability and authenticity of the information contained in the database. For example, how long will a facial image be stored and how will the personal information that can be linked to that image be secured against misuse?

Another issue raised by biometrics is the possibility of it being linked with other data to identify patterns and reveal personal information about individuals. For example, if used in shopping centers the information could be compiled to form shopping habit profiles for use by private or commercial entities. Yet another problem is the increased use of facial recognition and other forms of biometric surveillance: if biometric surveillance were ever to become ubiquitous (and with the increased use of security cameras in public places, this is not an unreal possibility) the linking of various digitized images could conceivably

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[27] "Crime Prevention Effects of Closed-Circuit Television: a Systematic Review" Home Office Research Studies (2002). website: http://www.homeoffice.gov.uk/rds/pdfs2/hors252.pdf

[28] Abernathy, William and Lee Tien. "Biometrics: Who's Watching You?" Electronic Frontier Foundation website (http://www.eff.org/Privacy/Surveillance//biometrics/)

produce a electronic trail of individuals' movements from place to place, a frightening prospect to say the least.

When facial recognition software was used at the 2002 Super Bowl it produced less of a public outcry due to heightened security concerns in the post 9-11 context; however, it was not used at the 2003 Super Bowl in San Diego. In the two years subsequent to its appearance in Florida, research revealed that the technology was better suited to *confirmation* of identification, as opposed to identification of individuals in a crowd. In addition, the nature of large-scale public events decreases the efficacy of positive identification using the software.

Despite its less than successful use as a security measure at large-scale public gatherings, facial recognition's use in identity confirmation has made it particularly useful at airports. In Canada, it is used at Toronto's Pearson International airport. While the RCMP assert that it is not applied for general surveillance, the software *is* used to confirm the identity of people who have been detained upon suspicion. Once photographed, suspicious travelers are photographed and that photograph is compared against a database of known terrorists and criminals. While similar privacy concerns are given for biometrics' use in identity confirmation, former federal Privacy Commissioner, George Radwanski, condoned the use of this software by law enforcement agencies, as it is applied at Pearson, as not giving rise to major privacy concerns.

Canada Customs has a program—CANPASS—that permits users to expedite passage through Customs and Immigration. Truck drivers transporting goods between the U.S. and Canada can have their fingerprints registered, and then submit to fingerscanning at the border. Major Canadian airports have CANPASS air kiosks, where a digital camera captures enables iris scans in order to verify the user's identity.

Recently, the Canadian Passport Office has announced that new passports will soon be equipped with digitized photographs that could enable biometric identification—such as measuring facial features or an iris scan. According to information released to the Canadian Press, the e-Passport will store the passport holder's personal information, such as name and address, on a computer chip. This information could be accessed by officials by swiping the card against an electronic reader. The project will be initially launched with diplomative passports in 2005 but is intended for general distribution.

Notes

(a) *R. v. Laroche*, 2002 SCC 72

As discussed in *Law*, in ***R. v. Colarusso*** **[1994] 1 SCR 20**, evidence seized by a coronor could not be used by the criminal law enforcement arm of the state without a warrant. In a judgement released at the same time as Jarvis, ***R. v. Laroche*, 2002 SCC 72**, the Court elaborated on its decision in Calorusso. The Crown alleged that Mr. Laroche was in the business of selling vehicles with stolen parts. The police had seized Mr. Laroche's vehicles pursuant to ss. 462.32 and 462.33 of the *Criminal Code*. Mr Laroche applied to have this seizure set aside. Grenier J., of the Quebec Superior Court, set aside the seizure. He held that the S.A.A.Q., the provincial licensing authority, should not have given the Quebec Police the information that had initiated the investigation without a warrant. The Supreme Court disagreed. Le Bel J., for the majority, stated, at paras. 83 and 84:

> The judgment contained a major error from the outset, about the judgment in *Colarusso*. In fact, the respondents did not defend the judgment on that point either in their factum or at the hearing. They conceded the error. The judge misinterpreted *Colarusso*, in which he seemed to think he had discovered a rule prohibiting the disclosure of information collected in the course of an administrative investigation to the police or the Crown for the purposes of a criminal investigation. In his view, disclosure of that information breached the privacy interests protected by s. 8 of the *Charter*.
>
> We need not dwell on the interpretation of *Colarusso*. Suffice it to note that the S.A.A.Q. employee was auditing rebuilt vehicle files submitted by the respondents in order to obtain certificates of technical compliance. The information thus obtained had originally been provided by the respondents, in compliance with the obligations imposed by the legislation and the regulations that applied under the legislation. Laroche and Garage Côté Laroche Inc. should have known that this information would necessarily be examined and audited by the S.A.A.Q. and was not, properly speaking, private in relation to the government. In carrying out and expanding his investigation, the employee was merely performing the duties of his position. Transmitting information to the police, to initiate an investigation into the irregularities that had been observed, was connected with the performance of his duties. That information constituted reasonable and probable grounds for obtaining the underlying search warrants at the stage when the restraint order was made and the warrants of seizure issued, and when they were reviewed; it was a major source of information concerning the respondents' criminal activities. The judge's error concerning *Colarusso* seems to have misled him into neither giving any attention to nor placing any weight on this fact, because the seizures and restraint order were quashed even in respect of the Toyota Tacomas and the allegedly rebuilt vehicles.

(b) Government Information Sharing and the *Privacy Act*

In its role as regulator and provider of services, the government acquires and uses vast amounts of information about individuals. This raises many questions regarding the conditions under which information gathered in one context may be used in another context. These questions are, to some extent, regulated under the *Privacy Act*, which will be discussed later in the course. However, as we will see, it is the *Charter* that will determine the ultimate permissibility of such practices. This is increasingly important, particularly in the context of state information practices in the wake of 9/11.

There are a few other important Supreme Court of Canada cases regarding information sharing by the state. In ***R. v. Ling*, 2002 SCC 74**, an appeal heard concurrently with *Jarvis*, the Supreme Court of Canada applied the principles set out in *Jarvis*. In ***R. v. Mills* [1999] 3 SCR 668** the Supreme Court affirmed that just because information is in the hands of the Crown, an individual's privacy interest in that information has not been lost: "Privacy is not an all or nothing right ... Where private information is disclosed to individuals outside of those to whom, or for purposes other than for which, it was originally divulged, the person to whom the information pertains may still hold a reasonable expectation of privacy." The argument in *Mills* had been that a complainant's therapeutic records divulged to the Crown lost any expectation of privacy and therefore should be shared with the defence.

(c) Information and Government Regulation

The Supreme Court of Canada has regularly asserted that information provided to the state as a consequence of the government's role of regulator and administrator attracts a lower level of privacy protection. For example, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425,, La Forest J. stated:

> In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

Notes

(a) *R. v. Tessling*, (2003) 63 O.R. (3d) 1

In *R. v. Tessling*, the Ontario Court of Appeal held that the use of FLIR technology in that cases violated the accused's s.8 rights. In seeking to distinguish *Plant*, Abella J.A., as she then was, argued, at para. 41:

> It is significant that the focus of the analysis in Plant was not on whether there is a privacy interest in home energy consumption, but on whether one has a reasonable expectation of privacy in records held by third parties. The court focused on the commercial relationship between the utility company and the accused as a utility user, concluding that the information available in the records was subject to inspection by members of the public at large. This supported the finding that the accused did not have a reasonable expectation of privacy in the records.

Similarly, later in her reasons Abella J.A. also stated, at para. 67:

> An individual's expectation that the state will respect the privacy of information about activities in his or her home, is a manifestly reasonable one. Unlike Plant, where the information sought by the state is already known and in the hands of a third party, namely the utility company, this is information unknowable without the FLIR technology. Like the interests protected in Duarte and Wong, the measurement of heat emanations from inside a home is the measurement of inherently private activities which should not be available for state scrutiny without prior judicial authorization.

This suggests that for the Ontario Court of Appeal, if information is held by third parties then it will be relatively difficult to establish a reasonable expectation of privacy in that information. The Supreme Court of Canada did not focus on this aspect of the Court of Appeal's reasoning, although it too thought that one element in determining whether there was a reasonable expectation of privacy was whether whether the information was already in the hands of third parties and, if so, whether it was subject to an obligation of confidence.

(b) Data Preservation and Third Parties

Following the Supreme Court decision in *R v. O'Connor*[29], which ruled that records held by third parties could be ordered released if they were sufficiently pertinent to a trial, sexual assault crisis centers were faced with potential violations of their client's privacy. One center responded to their lack of success in preventing the release counseling reports and other records by instituting a shredding policy for notes from cases that had "police involvement" and were likely to be subpoenaed.

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[29] [1995] 4 SCR 411

In *R v. Carosella*[30], the accused was charged with gross indecency after the complainant sought counseling from a sexual assault crisis center. During the counseling sessions, the complainant was informed that any records or notes from the discussion could be ordered released by a court should she choose to pursue criminal charges and agreed to proceed. When the defense requested the release of the center's notes pertaining to the complainant from the Crown, the center informed the court that these notes no longer existed as they were destroyed pursuant to the center's policy. The accused launched a section 7 challenge under the *Charter* alleging a violation of his right to make full answer and defense. The judge agreed that the missing material was relevant to the trial and that its absence had prejudiced the accused by denying him the chance to effectively cross-examine the complainant. Consequently, a stay of proceedings was ordered. The Court of Appeal overturned the trial judge's ruling and directed the matter to proceed to trial. The accused appealed to the Supreme Court.

Canada's highest court split on the case. The majority, written by Sopinka J. followed the trial judge and reversed the Court of Appeal ruling. The majority held that had the materials not been destroyed, they would have been released to the Crown and following the precedential threshold set out in *R v Stinchcombe*[31] would have been disclosed to the accused. Holding with the trial judge that the counseling notes were "logically probative" (para 47) to the issue at trial, their absence prevented the accused from making full answer and defense and therefore violated his constitutional rights. Consequently, the court re-instated the trial judge's stay of proceedings.

Writing for the dissent, L'Heureux-Dube agreed with the Court of Appeal's decision. She argues that the case does not involve the issue of disclosure. She writes, "It is crucial to recall....that in the case at bar, the Centre is a third party, a party which is under no obligation to preserve evidence for prosecutions or otherwise" (para 66). She asserts that an accused is not constitutionally entitled to a perfect trial, but only a "fundamentally fair" trial and the presence of every piece of relevant evidence is not only not required but impossible. Turning to a long line of Canadian and American jurisprudence, she asserts that the accused must bear the onus of proving that the absence of a piece of evidence seriously prejudices the potential for a fair trial before a stay of proceedings should be ordered. Agreeing with the Court of Appeal, L'Heureux-Dube asserts that the accused did not prove the relevancy of the documents even to the third party *O'Connor* standard. In short, the destruction of the documents, according to the dissent, does not "undermine the moral integrity of a prosecution" because it does not affect the fairness of the trial. L'Heureux-Dube suggests instead that the centers policy was "designed to protect its clients' privacy and ensure that women would not be dissuaded from seeking assistance for fear that their private discussions will be communicated to the defense" (para. 142).

(c) RFID technology

The image of the barcode has become ubiquitous in the retail context and we rarely give a second thought when a cashier scans in a product with a barcode; however, technological advancements are leading to barcodes' likely graduation to the next level of product tracking. Radio frequency identification (RFID) technology has the potential

[30] [1997] 1 SCR 80
[31] [1991] 3 SCR 326

to identify products and the people who buy and use with more sophistication and efficiency and consequently this technology has the potential to interfere with privacy.

RDIF's consist of a small and increasingly inexpensive electronic chip that contains digital information about the product. A portable reader can read the information contained on the chip, which is be imbedded into commercial products, from up to 30 meters away. When an RFID tag passes through the electromagnetic zone, it detects the reader's activation signal. This data is then transferred into the host computer for processing. Currently RDIF's are not widely used, but the advantages they offer over barcodes, including the ability to encode customer-specific data, such as credit card information and to track individual items, as opposed to merely by type, make them an attractive alternative for businesses. RFID's also offer the ability to track an item remotely, as opposed to, which require a close-proximity scan.

Of course, as with many new technologies, RFIDs are not without wider societal issues and concerns. In April of 2003, Benetton, an Italian clothier provoked public outrage in Europe when it announced that it would be using "smart-tags" in their products to identify and track inventory. While Benetton stated that it would offer customers the option to "kill" the chip in the product after purchase, privacy advocates objected to the potential for serious privacy violations that such electronic tracking presented. Following the public response to the announcement, Benetton agreed not to implement RDIF technology, for the meantime; however, as the price of individual chips comes down, widespread use becomes increasingly more likely.

One potential problem with RDIF's is their hypothetical use in police investigations. For example, a product containing an RDIF at a crime scene can be traced back to the original purchaser through the information on the chip and corresponding payment records. The laws concerning the use of information contained and available through the use of RDIF technology are uncertain and the issue of what police can and should have access to for the purposes of investigation is also an unanswered question. Given the likelihood of RDIF's eventually replacing barcodes in the retail context, law and policy makers will increasingly need to address the problematic privacy issues created by such technology.